2001

# Natrone Ward Sears v. Dwain Thomas Southworth : Brief of Appellant

Utah Supreme Court

# IN THE SUPREME COURT
## OF THE
# STATE OF UTAH

NATRONE WARD SEARS,
Plaintiff,

vs.

DWAIN THOMAS SOUTHWORTH,
Defendant/Third Party
Plaintiff/Appellant,

vs.

THE STATE OF UTAH
DEPARTMENT OF HIGHWAYS,
Third Party Defendant/
Respondent.

Case No.
14669

## BRIEF OF APPELLANT

Appeal from Judgment against Appellant dismissing complaint in the Second Judicial District Court in and for the County of Weber, State of Utah, the Honorable Ronald O. Hyde presiding.

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| DWAIN THOMAS SOUTHWORTH, | : | |
| Defendant/Third Party Plaintiff and Appellant, | : | |
| vs. | : | |
| THE STATE OF UTAH, DEPARTMENT OF HIGHWAYS, | : | |
| Third Party Defendant and Respondent. | : | |

# BRIEF OF APPELLANT

## STATEMENT OF THE NATURE OF THE CASE

This is an appeal from an adverse decision by the lower Court where the lower Court granted third party defendant and respondent's Motion to Dismiss, same having been filed on the 24th day of February, 1976, and having been decided by the Honorable Ronald O. Hyde, District Court Judge of the District Court of Weber County, State of Utah, same having been decided by Memorandum Decision on the 21st day of May, 1976, and by Order Dismissing Third Party Complaint of Dwain Thomas Southworth against the State of Utah, Department of Highways, signed on the 1st day of June, 1976. Third party plaintiff, Dwain Thomas Southworth, and appellant herein, was party to a suit filed by Natrone Ward Sears, plaintiff in lower Court, against the

aforementioned third party plaintiff and appellant herein, same having been filed by plaintiff in the lower Court on or about the 8th day of November, 1974, against defendant and third party plaintiff, appellant herein, seeking recovery for personal injuries suffered by her resulting from a motor vehicle accident. Subsequent to the filing of the original Complaint herein by plaintiff in the lower Court, third party plaintiff and appellant herein, did file his Amended Third Party Complaint against the State of Utah, Department of Highways, third party defendant and respondent herein, claiming negligence on the part of the State of Utah, Department of Highways, and seeking recovery for personal injuries suffered by him as a result of the motor vehicle accident herein. Prior to trial on the merits, third party defendant-respondent did file their Motion to Dismiss the Second Cause of Action of third party plaintiff-appellant's Amended Third Party Complaint on the ground that appellant failed to comply with the Utah Governmental Immunity Act regarding notice to the State of Utah.

The basis for their Motion to Dismiss, was that the original accident herein occurred on the 10th day of May, 1973, and that Notice of Claim by third party plaintiff-appellant against the State of Utah was not filed until the 5th day of April, 1975.

On or about the 24th day of February, 1976, third party defendant-respondent did file their Motion to Dismiss third party plaintiff-appellant's action herein, and supported same

with a Memorandum of Points and Authorities. On or about the 26th day of March, 1976, third party plaintiff-appellant did respond by filing his Memorandum of Points and Authorities in opposition to third party defendant's Motion to Dismiss. Third party defendant-respondent then filed their Reply Memorandum and both parties allowed the lower Court to decide the questions submitted pursuant to Rule 2.8, Rules of Practice of the District Courts of the State of Utah without further oral argument.

Third party defendant-respondent's Motion to Dismiss was granted by the lower Court on the 21st day of May, 1976, and this appeal is based on that decision.

## DISPOSITION IN LOWER COURT

Third party defendant-respondent's Motion to Dismiss third party plaintiff-appellant's action brought against it was granted by the lower Court based upon the fact that Notice of Claim against the State of Utah was filed over one year from the date that the accident complained of occurred claiming that the State of Utah did not receive sufficient and adequate notice within the one year provision as set forth in the Governmental Immunity Act, Utah Code Annotated, Chapter 30, Section 63 thereof.

## RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the lower Court's granting of third party defendant-respondent's Motion to Dismiss, and that this Court issue an Order to the lower Court ordering it to accept third party plaintiff-appellant's Amended Complaint against third party defendant-respondent for the reason that the Notice of Claim requirement as a prerequisite to maintaining

an action against the State of Utah for negligence does create a special statute of limitations for Governmental Tort Feasors and as such is violative of the equal protection guarantees of the Constitution of the United States and of the Constitution of the State of Utah.

That in the event this Honorable Court does not believe that the Notice of Claim requirement creates a special statute of limitations as hereinabove requested, that then in that event this Honorable Court Order the lower Court to accept third party plaintiff-appellant's Amended Complaint in that the Notice of Claim requirement does not apply when a claim against the State for negligence in the exercise of a proprietary function is presented.

That in the event neither of the above is granted by this Honorable Court, that then in that event this Honorable Court Order the lower Court to accept the Amended Complaint of third party plaintiff-appellant to allow third party plaintiff-appellant to present sufficient evidence to indicate that no knowledge of the negligence of the State of Utah was discovered until the time set for taking Depositions and not until approximately March 7, 1975.

## STATEMENT OF THE FACTS

This matter was commenced in the lower Court, by the filing of a Complaint in the District Court of Weber County, State of Utah, by plaintiff herein, Natrone Ward Sears, said Complaint having been filed on or about the 11th day of November, 1974, against defendant third party plaintiff and appellant herein,

Dwain Thomas Southworth, seeking recovery for injuries suffered by the aforesaid plaintiff, as a result of an automobile collision which occurred on Interstate 15 near Sunset, Davis County, Utah, on or about the 10th day of May, 1973.

An Answer was filed by defendant, Dwain Thomas Southworth, on or about the 2nd day of December, 1974. Thereupon, defendant obtained the services of additional counsel, and on or about the 24th day of December, 1974, did file an Amended Answer and Counterclaim. In said Counterclaim damages were sought for personal injuries suffered as a result of the automobile accident which occurred on or about the 10th day of May, 1973, as above referred to. On or about the 2nd day of January, 1975, original counsel for defendant and then counterclaimant, Dwain Thomas Southworth, filed a Notice of Claim against the State of Utah, Department of Highways and to the Attorney General of the State of Utah, basically seeking contribution from the State of Utah, Department of Highways proportionate to its degree of negligence claimed in said notice to be failure to adequately place warning signs or other devices prior to the point where the inside lane of travel on said highway had been obstructed by the placing of conical warning signs blocking said lane of highway. That thereupon, on or about the 21st day of February, 1975, a Third Party Complaint was filed by defendant and third party plaintiff, appellant herein, against the State of Utah, Department of Highways, primarily seeking payment by the State of Utah, Department of Highways for any Judgment which plaintiff herein would obtain for injuries and damages against defendant and

third party plaintiff.

Thereafter, on or about the 5th day of April, 1975, Dwain Thomas Southworth did file his notice to the State of Utah directing same to the Attorney General of the State of Utah and to the State of Utah Road Commission, claiming damages suffered by him as a result of the negligence of the State of Utah, and the State of Utah Road Commission, in failure to adequately provide warning of an obstruction which was present on the road hereinabove referred to and claiming that said failure to warn resulted in the accident herein.

Thereafter, defendant and third party plaintiff, appellant herein, filed his Motion to Amend the Third Party Complaint herein, same having been filed on the 29th day of December, 1975. Said Motion to Amend Third Party Complaint was opposed by third party defendant, respondent herein, and memoranda by both third party plaintiff and third party defendant were filed supporting their respective contentions. Argument was had thereon before the District Court of the Second Judicial District in and for the County of Weber, State of Utah, the Honorable Judge Calvin Gould presiding, on the 11th day of February, 1976, whereupon the Court took the Motion to Amend his Third Party Complaint under advisement. A Memorandum Decision was rendered by the Honorable Calvin Gould on the 17th day of February, 1976, granting third party plaintiff's Motion to Amend Third Party Complaint. Thereafter, on or about the 20th day of February, 1976, defendant-third party plaintiff-appellant filed his Amended Third Party Complaint against third party defendant-respondent.

Third party defendant-respondent filed its Motion to Dismiss on or about the 24th day of February, 1976, with supporting Memorandum of Points and Authorities thereon. Defendant third party plaintiff and appellant herein filed his Memorandum of Points and Authorities in opposition to third party defendant's Motion to Dismiss on or about the 26th day of March, 1976, whereupon a Reply Memorandum was filed by third party defendant and respondent herein on or about the 30th day of March, 1976. Lower Court, the Honorable Judge Ronald O. Hyde granted third party defendant's Motion to Dismiss, finding the case of Gallegos v. Midvale City, 27 Utah 2nd 27, 492 P 2nd 1335 (1972) as controlling of the question. Defendant, third party plaintiff-appellant filed his Notice of Appeal on the 28th day of June, 1976, said Appeal being filed before this Honorable Court on the 10th day of August, 1976.

Appellant herein intends to rely primarily on the record before this Court and on the extensive memoranda submitted by both sides in the lower Court.

## ARGUMENT

### POINT I.

### THE MAINTENANCE OF PUBLIC HIGHWAYS IS A PROPRIETARY FUNCTION OF GOVERNMENT AND IS NOT WITHIN SCOPE OF THE DOCTRINE OF SOVEREIGN IMMUNITY. THEREFORE, LIABILITY OF THE STATE EXISTS OUTSIDE THE SCOPE OF THE GOVERNMENTAL IMMUNITY ACT AND THE NOTICE REQUIREMENTS THEREIN ARE INAPPLICABLE.

The Court is referred to the Memorandum of Points and Authorities in opposition to third party defendant's Motion to

Dismiss which was filed with the lower Court by defendant and third party plaintiff, appellant herein.

The State herein undertook a proprietary function by its undertaking the maintenance of public highways herein and the painting thereof. At the time that the accident complained of in this action occurred, the State of Utah was in the process of painting lines upon the highway in the vicinity of the accident site, and in doing so failed to take adequate precautionary measures to insure that an accident of this nature would not occur. Idaho, our neighboring State, in a 1970 decision, held that the Doctrine of Sovereign Immunity was inapplicable where a unit of government acts in a proprietary function. The Idaho Supreme Court further held that the construction and maintenance of highways is a proprietary function, which is the case before the Bar here. See Smith v. State, 93 Idaho 795, 473 P 2nd 937 (1970).

It is contended by appellant herein that the rationale followed in Smith should be followed by this Honorable Court where the Court stated at 473 P 2nd 937, page 946 thereof, as follows:

> "We therefore hold that the Highway Department is subject to liability for harm caused to persons lawfully using the highways for the purposes intended when the State Highway Department creates or maintains a dangerous condition on the highway if the State Highway Department: (1) Knows of or by the exercise of reasonable care would discover such condition, (2) should realize that the condition involved an unreasonable risk of harm to those using the highways, and (3) should expect that persons using

> the highway will not discover or realize the danger, and (4) fails to exercise reasonable care to make the condition safe or to adequately warn of the condition and the risk involved, and (5) the persons using the highways do not know or have reason to know of the condition and attendant risks." cf., 2 Restatement of Torts, Sections 342, 343, and 343A.

Along the same lines the Court has referred to Prosser, Law of Torts, 3rd Ed. Chapter 27, Section 125.

POINT II.

THE RIGHT TO BRING AN ACTION FOR DAMAGES AGAINST A TORT FEASOR IS A RIGHT VESTED IN THE VICTIM AND CANNOT BE DENIED NOR ENCUMBERED BY THE STATE ABSENT A REASONABLE BASIS FOR THAT ACTION. THEREFORE, THAT PART OF THE UTAH GOVERNMENTAL IMMUNITY ACT WHICH REQUIRES TIMELY NOTICE PRIOR TO THE FILING OF A CLAIM UNDER THE ACT IS VOID AND OF NO EFFECT AS VIOLATIVE OF THE EQUAL PROTECTION GUARANTEES OF THE STATE AND FEDERAL CONSTITUTIONS.

The lower Court in granting third party defendant's Motion to Dismiss, primarily relied on the case of Gallegos v. Midvale City, 27 Utah 2nd 27, 492 P 2d 1335 (1972). Although that case primarily dealt with the question whether or not a minor was subject to the notice requirement pursuant to the Waiver of Sovereign Immunity involving cities, the Honorable Justice Ellett in his dissenting opinion starting at page 1338 of 492 P 2nd presented a far more convincing argument recognizing the

problem with the equal protection guarantees of the Constitution of the United States and the Constitution of the State of Utah.

There is no question that the Governmental Immunity Act requiring notice to the government of injuries sustained as a result of the negligence of governmental agencies, sets up four separate types of classes, those being governmental tort feasors, private tort feasors, victims of governmental tort feasors, and victims of private tort feasors. For an extensive review and discussion of the background and problems inherent in the notice requirement provisions in Waivers of Governmental Immunity Acts, see 60 Cornell Law Review 417, a copy of which was attached to third party plaintiff and appellant's Memorandum of Points and Authorities in opposition to third party defendant's Motion to Dismiss, submitted to the lower Court herein.

There is no question that the traditional policies that the King can do no wrong have been changed, and realistically should have been changed. In American society, government does not emanate from a superior being, but rather emanates directly from the people, and as such, government is nothing more than a body of the people. As such, the old adage of the King can do no wrong is an outmoded and outdated concept, which was recognized by the Legislature of the State of Utah when they passed into law Chapter 30, Section 63 of the Utah Code Annotated, generally referred to as the Utah Governmental Immunity Act. However, when the Legislature required the various notice requirements, Section 63-30-12, Utah Code Annotated, it placed a severe burden upon injured parties suffered as a result of governmental torts, and

placed the governmental entities in a much more favored class than private tort feasors.

The Court's attention is drawn to the extensive arguments set forth in third party plaintiff-appellant's Memorandum of Points and Authorities in opposition to third party defendant's Motion to Dismiss, having been submitted to lower Court, and appellant herein is not going to reiterate the arguments contained therein, however, is going to rely upon the extensive law presented heretofore and which has been made a part of the record herein.

The Court is further referred to the article contained in 1975 Utah Law Review 1027, and starting at page 1043 thereof.

## POINT III.

## THE STATE OF UTAH DID RECEIVE ADEQUATE NOTICE OF THE ACCIDENT INVOLVED, AND WERE AWARE OR SHOULD HAVE BEEN AWARE OF THE NEGLIGENCE INVOLVED.

Even if we accept the State's contention that no notice was provided to it pursuant to the Governmental Immunity Act, there is no way that the State can deny that they were aware of the accident herein, since the accident herein was investigated by its law enforcement officers and a written investigating officer's report of traffic accident was filed with the State as required. Said report was filed on or about the 25th day of May, 1973, bearing number 46489. The State of Utah, by and through its agents, were aware or should have been aware of the painting operation which had occurred, in that the report specifically set forth the driver of vehicle number two was slowing down for State Road paint crews on I-15. The lane was marked with rubber

cones. Some cones were placed diagonally across the inside traffic lane.... It is further interesting to note that the official report filed by the investigating officer and his field note report indicate a different location of the warning sign warning of the painting which was being conducted. The field note report indicating that the warning sign was placed behind the conical warning markers, and the official report filed with the State indicating that the warning sign was placed somewhat ahead of the conical warning markers.

At any rate, if this Honorable Court finds that the one year notice requirement set forth in the Governmental Immunity Act is valid, then appellant should still be allowed to proceed on the basis of the dissent by the Honorable Justice Maughan in the case of Scarborough v. Granite School District, 531 P 2d 480, (1975), in that the notice requirement and the justifications for said requirement were satisfied by the filing of an accident report filed by the investigating officer of said accident. Further, the one year notice requirement if same is found to be constitutional and valid, should not begin to run until discovery of the negligence of the State of Utah was made, which said discovery of negligence was not made until approximately the 7th day of March, 1975.

## CONCLUSIONS

The painting of a highway by the State of Utah was a proprietary function of government, and as such, is not within the scope of the Doctrine of Sovereign Immunity, and as such, does not require that the notice provision of the Governmental

Immunity Act be complied with.

The requirement of the giving of a notice prior to a filing of suit, and said notice being shorter than the statute of limitations for tortious conduct of private tort feasors, creates special legislation in favor of governmental entities, and creates four separate classes of individuals affected by tortious conduct, with governmental entities being given preferred status, and as such, is a violation of the equal protection clauses of the Constitution of the State of Utah as well as the Constitution of the United States of America. As such, the notice requirement of the Governmental Immunity Act should be declared as invalid and unconstitutional and of no force and effect.

The fact that a written investigating officer's report of traffic accident was filed with the State of Utah should have given the State of Utah adequate and sufficient notice of the possible action or claim against it where the report refers to the actions of the State Road paint crew and indicates that the site of the accident was at the same place where the State Road paint crew placed conical warning markers across one lane of traffic. As such, if the notice requirement provision is upheld by this Honorable Court, this Court should find that notice was given to the State of Utah, and that the underlying theories for the giving of notice was substantially complied with.

Further, this Court should rule that the running of the one year notice requirement does not take effect until such time that an injured party discovers the negligence of the governmental entity involved.

Respectfully submitted this 8th day of October, 1976.

GALE, HAVAS & LEMA

David B. Havas
Attorneys for Third Party
Plaintiff Appellant

CERTIFICATE OF MAILING

Mailed a true and correct copy of the above and foregoing Appeal to attorney for third party defendant and respondent, Kim R. Wilson, Seventh Floor Continental Bank Building, Salt Lake City, Utah 84101, postage prepaid, on this 8th day of October, 1976.

LINDA MOORE, Secretary